89-413

Supreme Court, U.S.
FILED
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

DAVID JOCHEN,

Petitioner,

-AGAINST-

THE DEPARTMENT OF VETERANS AFFAIRS, et al.,

Respondents.

FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION

David Jochen
Pro Se Petitioner
P.O. Box 84108
Los Angeles, CA. 90073
(818) 884-5836

80pp

QUESTIONS PRESENTED

I. Whether there was error in characterizing the site visit as a law enforcement exception under 5 USC 552a § (e)(7) (the Privacy Act of 1974) so that petitioner's First Amendment rights of the United States Constitution were violated by the Site Visit Report and by petitioner's reassignment?

II. Whether there was error in applying the facts surrounding petitioner's reassignment to the plain meaning of the VA regulation controlling reassignment so that a violation of petitioner's right to procedural due process for a property interest under the Fifth Amendment of the United States Constitution has occurred?

III. Whether there was error when summary judgment was granted respondants without giving petitioner an adequate opportunity for discovery so there was a violation of petitioner's procedural

due process rights under the Fifth Amendment to the United States Constitution?

IV. Whether information used by a federal agency in making an adverse determination about a federal employee must be placed within the system of records of that individual under 5 USC 552a §§ (e)(5) and (g)(1)(C) (the Privacy Act of 1974)?

V. Whether records that are within 5 USC 552a § (g)(1)(C) are subject to the remedy provisions of § (g)(2)(A) (the Privacy Act of 1974)?

VI. Whether petitioner is entitled to a factual determination by the courts as to the reasonableness of the "same decision anyway" defense used by respondants for petitioner's reassignment so as to resolve petitioner's claims against the Inspector General and the Special Counsel under 5 USC § 706 (the Administrative Procedures Act of 1976)?

PARTIES

Respondents - The Department of Veterans Affairs was formerly named the Veterans Administration. The Administrator is now the Secretary. The Inspector General of the Veterans Administration is now the Inspector General of the Department of Veterans Affairs. The Special Counsel, Merit Systems Protection Board, remains the same. Each individual specifically named in the original complaint was sued in their representative capacity and are no longer specifically named. Each current department or agency head is a party in their representative capacity.

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OPINIONS BELOW

The opinion and order of the United States District Court for Central California is unreported and is contained in the Transcript of Record. The opinion of the United States Court of Appeals for the Ninth Circuit is unreported and is contained in Memorandum.

JURISDICTION

The judgment of the court of appeals was filed on April 5, 1989. Appellant's request for extension of time for petition of rehearing was granted and the rehearing brief filed May 3, 1989. Rehearing was denied by the court on June 6, 1989. The jurisdiction of this Court for writ of certiorari is invoked under 28 USC § 1254 (1).

STATUTES AND REGULATIONS

The text of the following statutes and regulations relevant to the determinationof the present case is set forth in the appendix: 5 USC § 552a (the Privacy Act of 1974); 5 USC § 706 (the Administrative Procedure Act of 1976); 5 USC § 2301 and 2302 (the Civil Service Reform Act of 1978); and DM&S Supplement, MP-5, Part II, Chapter 11.

STATEMENT OF THE CASE

Petitioner, David Jochen, a dentist for the Department of Veterans Affairs

(VA) after twelve years of highly satisfactory service as Assistant Chief of the Los Angeles, California, Central Dental Laboratory (CDL), was not selected to the Chief position of the CDL in January, 1985. His non-selection was based upon alleged difficulties with interpersonal relations. There was no record of these allegations in the agency's system of records of the petitioner.

In March, 1985, petitioner appealed to his congressman to inquire as to the justification for his non-selection. On July 9, 1985, petitioner whistleblew to the Inspector General (IG) regarding improprieties of the incumbent Chief of the CDL. On July 11, 1985, petitioner was restricted in his duties and confined to his office. On July 20, 1985, prtitioner requested investigation by the Special Counsel (OSC) for possible prohibited personnel practices by the VA under 5 USC §§ 2301 and 2302.

On July 30, 1985, in response to the inquiries of petitioner's congressman, the

VA offered to answer petitioner's concerns by visiting the CDL. In September, 1985, petitioner was detailed to another department and subsequently reassigned to clinical duty for alleged "difficulties with interpersonal relations". A record of allegations was contained in the agency document, the Site Visit Report, (SVR) but was not a part of the agency's system of records of the petitioner.

Ultimately, the IG and the OSC determined that there was justification for the whistleblowing but reassignment was "considered" before the whistleblowing and there was no nexus to the congressional appeals.

Subsequently, this suit was initiated in Federal District Court of Central California and summary judgment was granted to the respondents. On appeal the Ninth Circuit Court of Appeals sustained the district court.

SUMMARY OF ARGUMENT

Petitioner has stated valid claims under the First and Fifth Amendments to the United States Constitution, under the Federal Rules of Civil Procedure (FRCP 1 and 56), under the provisions of the Privacy Act, the Civil Service Reform Act, and the Administrative Procedures Act.

The First Amendment Issue

Petitioner argues that his First Amendment right to freedom of expression was violated when he was reassigned as a result of his congressional appeals and his whistleblowing. The alleged "disruptive" actions by petitioner were accomplished in a prescribed manner in accordance to regulations. The characterization of the SVR as a record legitimately portrayiing petitioner's suitability in his job is misplaced and underscores the chilling effect of such an implication.

Petitioner's situation involving the SVR parallels that of Albright v. United States, 631 F.2d 915, 920 (D.C. Cir. 1980) (questioning agency action and complaining about it falls within the Fist Amendment rights of public employees) and warrants expungment under the Privacy Act §(e)(7) and §(g)(2)(A).

First Amendment expression related to whistleblowing and through congressional appeal is protected whether or not it occurs in the work environment. The chilling effect of the VA action in reassignment and in filing of the SVR are an affront to petitioner's First Amendment rights. The failure of the lower courts to protect these rights will have a ripple effect upon other honest, conscientious federal employees. The permissive approach displayed by the Ninth Circuit Court decision appears to be in disregard to and in misapplication of that court's earlier decis-

ion in MacPherson v. I.R.S., 803 F.2d 479, 484 (9th Cir. 1986)(individual First Amendment implications require a balancing with agency recordkeeping needs) and with this Court's decision in Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 413 (1978)(a public employee does not forfeit his First Amendment protection against governmental abridgment of freedom of speech when he arranges to communicate privately with his employer rather than to express his views publicly). The site visit was a meeting arranged by petitioner's congressman for the petitioner to air his non-selection complaints and his whistleblowing concerns with the VA.

The Fifth Amendment Issue

Petitioner has stated a valid claim with regard to his Fifth Amendment property interest. Because petitioner lost his contracted special pay when he was reassigned

for reasons not primarily based on patient care needs as directed by VA regulation and never given a hearing regarding the matter, his Fifth Amendment rights to procedural due process were violated. The lower courts have failed to deal fairly with the primacy basis for petitioner's reassignment (DM&S Supplement, MP-5, Part II, Chapter 11). Petitioner believes that the interpretation of the VA regulation by the lower courts is so obtuse that the clear meaning of the regulation has not been fairly applied to petitioner's situation and consequently procedural due process was denied.

The Discovery Issue

Petitioner believes that he has been denied procedural due process with regard to adjudication of his case under FRCP 1 and 56. Summary judgment was granted respondents by the district court without

regard to petitioner's need for and his initiation of the discovery process as stated in plaintiff's Memorandum in Opposition to Motion for Summary Judgment (CR 24, p. 14). Petitioner's Privacy Act (PA) causes of action were foreclosed because the district court erroneously found that "no willful or intentional" claims were alleged by petitioner. Since claims were (wrongly) dismissed on that basis, the court failed to demonstrate proper concern for petitioner's opportunity for complete discovery.

The appeals court was apprised of the district court's clear error (Brief for the Appellant at 24). It failed to consider the effect of the discovery denial, and in evaluating petitioner's evidence, found it to be insufficient.

With regard to petitioner's Fifth Amendment and Administrative Procedure Act (APA) claims, the district court found that

petitioner's evidence under Celotex v. Catrett, 477 U.S. 317 (1986) and Anderson v. Liberty Lobby, 477 U.S. 242 (1986) was "conclusionary" or "merely colorable". In both cases this Court prefaced its words with a requirement that the evidenciary determination be made after adequate or full discovery, Celotex at 322 and Anderson at 257. This opportunity was not afforded petitioner. His objections were presented to the court of appeals with no effect (Brief for the Appellant at 33), and injustice results. Additionally, the district court's reliance on the "merely colorable" characterization of petitioner's evidence as the basis for claim denial would seem to be contrary to this Court's long established definition of the term "colorable" in Harrison v. Chamberlin, 271 U.S. 191, 193 (1926).

The lower court's failure to give petitioner a meaningful opportunity for discovery and then to grant summary judg-

ment against petitioner for insufficient evidence is abhorrent to justice. It destroys the basic principles of fair play and integrity that this Court has championed. A complaint is to be construed liberally for a pro se litigant, Boag v. MacDougall, 454 U.S. 364, 365 (1982). This was not done.

The Privacy Act Issues

The VA violated the petitioner's PA protections when it failed to maintain an accurate and complete system of records of the petitioner but used inaccurate information not contained in petitioner's system of records for employment determinations that were adverse to petitioner. The act clearly mandates that the information used for the basis of such determinations must be in the system of records of that individual, 5 USC 552a §§(e)(5) and (g)(1)(C).

The Office of Management and the Budget (OMB) acknowledged this principle of fairness, 40 Federal Register 28948, 28965, and 28969. This interpretation is supported by Clarkston v. I.R.S., 678 F.2d 1368, 1377 (11th Cir. 1982)(if [an agency] had intended to rely on records to make individual determinations, the Act would require the records to be indexed by the name or other identifying particular of the individual involved). Both Doe v. United States, 821 F.2d 694, 699 (D.C. Cir. 1987) (en banc)(the Privacy Act establishes as the recordkeeper's polestar, "fairness" to the individual about whom information is gathered) and Dickson v. Office of Personnel Management, 828 F.2d 32, 39 (D.C. Cir. 1987)(the general purpose of the Act is to promote fairness in record keeping) lend further support. Therefore, the information used by the VA in the adverse determinations against petitioner by

statutory command must be considered records within the petitioner's system of records and the remedies under 5 USC 552a §§(g)(1)(A) and (g)(2)(A) and (B) should be applicable.

Petitioner has not received fair treatment by the VA under the Privacy Act. The circumvention of the Act's provisions by the VA, whether intentional or not, is the antithesis of what the courts should advance. The Ninth Circuit's decision with regard to the petitioner clearly runs counter to the provisions and to the meaning of the Act and is in conflict with the fairness principles espoused by other circuits.

The Administrative Procedure Act Issues

The APA claim of petitioner is valid as both the IG and OSC were unreasonable in their investigations and conclusions. Both relied upon the determination that petitioner's reassignment which followed

his congressional appeals and his whistleblowing had been "considered" before his whistleblowing and had insufficient nexus to his appeals. This "same decision anyway" basis and justification appear to be contrary to this Court's decision in Mt. Healthy City Br. of Ed. v. Doyle, 429 U.S. 274, 287 (1977) and Givhan at 416. The fact that the alleged consideration occurred weeks before and was not acted upon until after petitioner's whistleblowing and was never made known to petitioner presents a genuine issue of material fact as to the legitimacy of the justification. That issue has not been fairly adjudicated. The APA, 5 USC §706(2)(A), was violated.

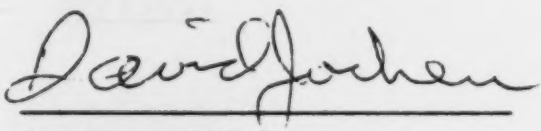
Conclusion

As a result of the lower court's decision with regard to petitioner, justice had not been served. Contradictions and conflicts abound among the lower

courts and between the Ninth Circuit and this Court. These conflicts create an unfair and unsettled atmoshpere regarding the issues presented and should be quieted by this Court.

Dated: September 5, 1989.

Respectfully submitted,



DAVID JOCHEN
Pro Se Petitioner

P.O. Box 84108
Los Angeles, CA. 90073
(818) 884-5836

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CICUIT

FILED
Apr 5, 1989

DAVID JOCHEN,	)	No. 88-6138
	)	
Plaintiff-Appellant,	)	D.C. No. CV 87-3855 RSWL
	)	
vs.	)	MEMORANDUM*
	)	
VETERANS ADMINISTRATION, et al.,	)	
	)	
Defendants-Appellees.	)	
	)	

Appeal from the United states District Court for the Central District of California Ronald S.W Lew, District Judge, Presiding

Argued and Submitted March 8, 1989
Pasadena, California

Before: SNEED, FARRIS, and PREGERSON Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Dr. David Jochen appeals the district court's grant of summary judgment in favor of defendant Veterans Administration et. al. ("VA") on all of Jochen's statutory and constitutional claims. Because we find that Jochen's appeal raises no genuine issue of material fact, we affirm the district court's grant of summary judgment.

BACKGROUND

In December 1984, Jochen applied for the position of Chief of the Central Dental Laboratory ("CDL") of the VA Wadsworth Medical Center ("WMC") in Los Angeles. The position went to Dr. William Pagan rather than Jochen. Jochen alleges that Dr. Chester Paczkowski, VA Director of Programs for Dentistry, informed him that he was not selected for the position because of his difficulties with interpersonal relations.

In July 1985, Jochen reported to Mr. Anderson, WMC's Director, and to a member

of the VA Office of Inspector General ("OIG") that Pagan's conduct as Chief of the CDL violated several federal statutes and regulations. Jochen alleges that as a result of his "whistle-blowing," Pagan relieved him of his major duties as Assistant Chief of the CDL. Jochen then filed a complaint with the Office of Special Cournsel ("OSC") of the Merit Systems Protection Board. He sought an investigation of Pagan's actions.

At the end of July, Dr. Paczkowski conducted a site visit of the CDL and filed a Site Visit Report ("SVR"). After interviews with Jochen and other staff members, Paczkowski concluded that Jochen should be reassigned. Jochen was subsequently transferred to the VA Dental Service in Brentwood, California. He filed a complaint to the OIG alleging that his transfer was a reprisal for previous complaints. Jochen also filed an administra-

tive grievance upon learning that he could not enter the CDL without Dr. Pagan's permission.

On April 15, 1986, the OSC determined that there was insufficient evidence to sustain Jochen's charges against Dr. Pagan. The OIG came to a similar conclusion and subsequently denied Jochen's request for a reevaluation of the case. In October 1986, Jochen filed a Privacy Act request wirh the VA for correction, amendment and expungement of Dr. Paczkowski's SVR.

On June 16, 1987, after the VA denied Jochen's request and subsequent appeal, Jochen filed the instant action in the district court. In response to Jochen's third amended complaint, the district court granted the VA's motion for summary judgment on all nine causes of action.

ANALYSIS

We review a grant of summary judgment de novo. Adams House Health Care v. Bowen, 862 F.2nd 1371, 1374 (9th Cir. 1988). Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

Privacy Act Claims

Jochen contends that the VA violated his rights under the Privacy Act of 1974, 5 U.S.C. §552(a) in three ways: (1) the

VA failed to maintain a complete system of records on Jochen with regard to the selection process for Chief of the CDL; and (2) the VA also failed to maintain a complete system of records on Jochen with regard to the decision to remove Jochen as Assistant Chief of the CDL; and (3) the VA deprived Jochen of his rights to amend, correct, or expunge incorrect information in his file.

The gist of Jochen's first claim is that the VA failed to include in its records a statement made by Dr. Minick, a former CDL chief, to Paczkowski that played a critical role in the selection of Pagan over Jochen for CDL Chief. Minici told Paczkowski that Jochen had "difficulties with interpersonal relation." Blue Brief at 11. Jochen contends that under section 552a(e)(5), the VA was obligated to keep a record of Minick's statement. The district court held that verbal opinions are not "records" within the meaning of section

552a(e)(5). We agree.

Section 552a(e) provides in pertinent part:

> Each agency that maintains a system of records shall--
>
> . . .
>
> (5) maintain all records which are used by the agency in making any determination about amy individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination . . . .

Section 552a(a) defines "record" as "any item, collection, or grouping of information about an individual that is maintained by an agency. . . ." Given that a record is comething maintained by a goverment agency, a verbal communication such as Minick's remark to Paczkowski does not constitute a record. See Federal Deposit Ins. Corp. v. Dye, 642 F.2d 833, 836 n. 5 (5th Cir. 1981)(verbal statements are not "records" under the Privacy Act). Therefore, the VA did not violate the Privacy Act in failing to keep a record of Minick's

remark.[1]

Jochen's second Privacy Act claim arises from the VA's decision to remove him from his post as the CDL's Assistant Chief. He contends that the VA improperly used information not contained in the VA's file on Jochen in making the removal decision.[2]

---

[1] Even assuming arguendo that verbal statements qualify as records under the Privacy Act, there is no evidence supporting Jochen's contention that the VA's failure to record Minick's remark was intentional or willful. See § 552a(g)(4)(intentional or willful conduct required for recovery of damages under the Privacy Act).

[2] In the second cause of action of his Third Amended Complaint, Jochen alleged that the VA's actions violated §§ 552a(e)(1), (2), (5), and (7). ER at 10. In his appeal, however, he premises his second cause of action on §§ 552a(e)(1), (2), (5), (g)(1)(C), and (g)(4)(A). We fail to see any factual basis for his section 552a(e)(1) and (2) allegations and therefore limit our review to his allegations regarding violations of sections 552a(e)(5) and (g). In his appeal, Jochen's section 552a(e)(7) allegation becomes a separate claim. See Issue III, Blue Brief at 24. We therefore discuss this claim separately as Jochen's third Privacy Act claim.

Specifically, the VA used information in Paczkowski's SVR. DThe SVR was not filed in the VA's file on Jochen but rather in a separate file containing records on the VA facility visited. Jochen contends that by not placing the SVR in Jochen's file, the VA failed to maintain a record that was necessary to assure fairness in the VA's decision to remove Jochen from the position of Assistant Chief of the CDL. See §§ 552a(e)(5) and 552a(g)(1)(C).

Damages are not available to Jochen even if the VA violated sections 552a(e)(5) and (g)(1)(C) unless Jochen can show that the VA acted willfully or intentionally. 5 U.S.C. § 552a(g)(4). Jochen offers no evidence that the VA acted willfully or intentionally in failing to place the SVR in Jochen's file.[3]

---

[3] Jochen contends that a comment by Dr. Paczkowski to the effect that Jochen should not oppose or appeal the removal decision is evidence that the VA was intentionally discouraging Jochen from obtaining a copy of the SVR. Blue Brief at 22. We fail to see any such evidentiary connection.

Accordingly, we find that the district court acted properly in granting summary judgment against Jochen on his second cause of action.

Jochen's third Privacy Act claim is actually twofold: (1) that the SVR is subject to amendment under subsections 552a (d)(2) and (d)(3); and (2) that the SVR, containing remarks ma[d]e by Jochen in the exercise of his First Amendment rights, is in violation of subsection 552a(e)(7). The district court found that sections 552a(d)(2), (3) and (e)(7) were inapplicable to Jochen because the SVR was not part of the system of records the VA maintained on Jochen. Alternatively, the district court concluded that the VA did not violate section 552a(e)(7) because preparing the SVR constituted an "act of determining whether a public employee is performing his job adequately is an authorized law enforcement activity" and therefore falls under section

552a(e)(7)'s law enforcement exception.

Jochen's (d)(2) and (d)(3) claim fails because the SVR is not in the system of records the VA kept on Jochen. See Baker v. Department of Navy, 814 F.2d 1381 (9th Cir.), cert. denied, 108 S.Ct. 450 (1987) (holding that an individual cannot seek amendment under the Privacy Act of a report that is not contained in the system of records on that individual).

The district court held that Jochen's (e)(7) claim fails for the same reason: the SVR was not contained in Jochen's file. Jochen contends, however, that under Albright v. United States, 631 F.2d 915 (D. C. Cir. 1980), subsection 552a(e)(7) applies even to a record not contained within an individual's file. We need not adopt or reject the District of Columbia Circuit's position in Albright because we agree with the district court's alternative ground for rejecting Jochen's (e)(7)

claim: the SVR falls under the (e)(7)'s authorized law enforcement activity exception. Dr. Paczkowski's site visit was aimed at assessing the validity of Jochen's concerns about the operation of the CDL. The resulting SVR was, therefore, made for an evaluative purpose and falls within the exception to (e)(7). Nagel v. U.S. Dept. of Health, Educ. and Welfare, 725 F.2d 1438 ([D.C.] Cir. 1984) ("A federal agency does not violate the [Privacy] Act if it records for evaluative or disciplinary purposes, statements made by employees while at work.")

Due Process Claim

Jochen's fourth claim arises from his removal as the Assistant Chief of the CDL. He contends that the resulting loss of pay violated his due process rights. The distict court found that Jochen presented insufficient evidence to raise a genuine

factual dispute. We agree.

The Special Pay Agreement under which Jochen received additional pay explicitly provides that any entitlement to special pay will terminate if the recipient is reassigned to an "excluded category," i.e., an assignment not designated to receive special pay. Because Jochen's property interest in the special pay was created by the terms of the Special Pay Agreement, the VA did not deprive him of the property interest by acting in conformity with the terms of the Agreement. See Board of Regents v. Roth, 408 U.S. 564, 577 (1972) ("[Property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.")

Jochen alleges, however, that the VA violated its own guidelines by reassigning him to another position merely so that he would develop leadership skills. In fact, the SVR stated that a transfer will allow Jochen to "sharpen his clinical skills" and then mentioned "effective leadership" in the next sentence. ER at 34. The VA quidlines provide:

> Transfers, reassignments, details, and changes in duty assigned will be based primarily on patient care needs. To the extent possible, these movements should be made to make maximum use of employees' skills and capabilities and to provide employees wirh opportunities for professional growth and development.

Blue Brief, Addendum at 7. Given this language, we do not find any violation in the VA's reassignment of Jochen.

Administrative Procedure Act Claim

Jochen's next three claims are based on 5 U.S.C. § 706 of the Administrative Procedure Act. Jochen contends that in

responding to his grievances, the OIG, the OSC, and the VA acted arbitrarily and capriciously. The district court found that Jochen failed to present any evidence of any misconduct on the part of these agencies.

5 U.S.C. § 706(2)(A) requires that we hold unlawful and set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." Although we review the district court's grant of summary judgment de novo, the standard we apply in reviewing agency actions is highly differential. We will not overturn an agency decision when the agency has based its decision on a consideration of the relevant factors and has not made a clear error in judgment. Sears Sav. Bank v. Federal Sav. & Loan Ins., 775 F.2d 1028, 1029 (9th Cir. 1985).

Jochen contends that the OIG and the OSC acted arbitrarily and capriciously in their respective investigations of his allegations against the VA. The record indicates otherwise. Both agencies looked into Jochen's allegations against Pagan and the Va, determined that there was insufficient evidence to sustain these allegations, and decided not to conduct any further investigations. We cannot find any clear error in the actions of these agencies. See Kotarski v. Cooper, 799 F.2d 1342 (9th Cir. 1986) vacated and remanded on other grounds, 108 S.Ct. 2861 (1988) (OS[C] fulfils its statutory role by investigating and reporting whether there are reasonable grounds to believe that a prohibited practice has occurred).

Jochen's contention that the VA acted arbitrarily and capriciously in tis response to his grievance is also meritless. Jochen filed a grievance upon being denied

entry to the CDL after he had been reassigned to another lovation. The VA's response to Jochen's grievance included three levels of review. In its final determination, the VA found that the adoption of a written visitation policy resolved the issue raised by Jochen's grievance. We cannot find any clear error in the VA's treatment of Jochen's grievance.

Mandamus Claim

Finally, Jochen contends that the failure by the OIG, the OSC, and the VA to act in accordance wirh their respective duties requires that these agencies be subjected to mandamus under 28 § 1361. Because we reject Jochen's contentions that these agencies acted arbitrarily and capriciously, we find not the slightest basis for a resort to extraordinary relief such as mandamus in this case.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed
Jun 6, 1989

DAVID JOCHEN,	)	No. 88-6138
	)	
Appellant,	)	
	)	
vs.	)	ORDER
	)	
VETERANS ADMINISTRATION, et al.,	)	
	)	
Appellees	)	
	)	

Before: SNEED, FARRIS, and PREGERSON, Ciruit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested an en banc hearing. Federal Rule 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - -

THE HONORABLE RONALD S.W. LEW, JUDGE PRSIDI

- - -

DAVID JOCHEN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CV-87-3855-RSWL
	)	
VETERANS ADMINISTRATION, et al.,	)	
	)	
Defendants.	)	
	)	

REPORTER"S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
Monday, December7, 1987
Monday, April 4, 1988

APPEARANCES:

FOR THE PLAINTIFF:
DAVID JOCHEN
[Pro Se Plaintiff]
P.O. Box 84108
Los Angeles, California 90073

FOR THE DEFENDANT:
IAN FAN
Assistant U.S. Attorney
U.S. Courthouse
312 N. Spring Street
Los Angeles, California 90012

LUCILLE M. LITSHEIM, CSR #2409
U.S. Court Reporter
Room 436, U.S. Courthouse
312 N. Spring Street
Los Angeles, California 90012

LOS ANGELES, CALIFORNIA, MONDAY, APRIL 4, 1988; 9:30 A.M.

-oOo-

THE CLERK: Item No. 11, Civil 87-3855, David Jochen versus Veterans Administration, et al.

Counsel, please make your appearance.

Dr. JOCHEN: Good morning, Your Honor. David Jochen pro per, plaintiff.

MR. FAN: Ian Fan for the government.

THE COURT: This is a motion for summary judgment filed by the defense. There have been two other complaints that I allowed you to amend, Mr. Jochen, and obviously having heard the case on other occations and having read and considered the papers here for defendant's motion for summary judgment, I feel I know the case as well as need be. I just query whether or not you have anything else to point out to the court or argue.

DR. JOCHEN: No, Your Honor.

MR. FAN: No, Your Honor.

THE COURT: In that event, this is the court's order.

There has been considerable expenditure of human resources on the part of this court, as well as the defendant, in affording you the pro se litigant, Dr. David Jochen, in consideration for determining the claims. In deference to the pro se status of the plaintiff, the court has allowed you, Dr. Jochen, to bring a third amended complaint and each amended complaint was just as confusing as the initial one. Plaintiff has maintained -- plaintiff maintained this same standard of confusion with respect to every document filed with the court. It appears to the court that there are no triable issues of material fact.

With regard to the first claim, summary judgment is granted in favor of the defendant as it appears to the court that

verbal opinions are not records that must be maintained within the "systems of records" as required by the Privacy Act. I cite FPIC versus Dye, 642 F.2d 833.

It is unclear as to what remedy plaintiff seeks under the second claim. But it really doesnit matter, as summary judgment is granted in favor of the defendant with regard to the second claim since it appears that the site report was not maintained in the system of records as required by the Privacy act; therfore, the remedies available under the act, amendment and/or expungement are not available. See Baker versus Department of Navy, 814, F.2d 1391.

Damages are not available since the plaintiff has not alleged willful or intentional conduct.

It further appears to the court that the site visit report doesn't violate U.S. C. 552a (e)(7) since the report is not maintained in the system of records and in

any event, the act of determining whether a public employee is perforning his job adequately is an authorized law enforcement activity. I cite for you Nagel versus Department of HEW, 725 Fed. 2d 1438.

Ingranting summary judgment in favor of the defendant on the third claim for an alleged due process violation, it appears to the court that plaintiff's reassignment was based on patient care needs. The maintenance of high morale among the staff is a legitimate concern when assessing factors that could affect the standard of patient care administered in the dental lab. Any colorable as opposed to being probative. No, excuse me. Any evidence submitted by the plaintiff on this matter was merely colorable as opposed to being probative. And I cite Anderson v. Liberty Lobby, 106 Supreme Court 2505.

Plaintiff has not submitted any probative evidence with regard to the fourth, six and eighth claims. It appears to the

court that the actions of the Office of the Inspector General and the Office of the Special Counsel were neither arbitrary nor capricious.

Further, Veterans Administration afforded plaintiff every consideration in the handling his grievance which resulted in the adoption of written visitati - policies. The evidence submitted by plaintiff on these claims is conclusionary and could be termed colorable only by a long stretch of the imagination. Therefore, plaintiff fails to withstand defendant's summary judgment motion pursuant to Celotex versus Carrett, 106 Supreme Court 2548.

And obviously, since there are no violations of the Administrative Procedure Act under the fourth, sixth and eighth claims, the requests for mandamus under the fifth, seventh and ninth claims do not lie.

The court now adopts the defendant's statement of uncontroverted facts and conclusions of law as the court's order.

Lastly, Dr. Jochen, plaintiff, states that there is an ex parte application still pending before the court which requests the court's ruling in a previous 12(b)(6) motion be reviewed for error. Upon reviewing the contentions of the parties in that previous motion, the court determines that there are no errors in its ruling and the ex parte motion is now denied.

That's the court's order. Defendant is to prepare the order. That concludes the matter.

DR. JOCHEN: Thank you, Your Honor.

MR. FAN: Thank you, Your Honor. For clarification, we've already lodged a proposed judgment. Will that be different than what you seek now?

THE COURT: Right.

MR. FAN: Thank you, Your Honor

-oOo-

I certify that the foregoing is a correct transcript of the proceedings held in the above-entitled matter. LUCILLE M. LITSHEIM
June 21, 1988

ROBER C. BONNER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division
IAN FAN
Assistant United States Attorney
1100 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 894-2445

Attorneys for Defendants

FILED
April 22, 1988

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

DAVID JOCHEN, Plaintiff, v. VETERANS ADMINISTRATION, et al., Defendants.	No. CV 87-03855-RSWL (JRx) ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Defendants' motion for summary judgment came on for hearing on April 4, 1988, before the Honorable Ronald S.W. Lew, United States District Judge. Defendants were represented by Ian Fan, Assistant United States Attorney. Plaintiff represented himself in pro propria persona.

Upon consideration of the moving papers, the parties having stated that they did not wish to add anything, IT IS ORDERED that defendants' motion is granted.

DATED: This 21st day of April, 1988.

Ronald S.W. Lew
UNITED STATES DISTRICT JUDGE

Approved as to form:

DAVID G. JOCHEN
Plaintiff in propria persona

Department of Medicine Washington
and Surgery D.C. 20420

TERANS
INISTRATION

ly 30, 1985 In Reply to: 163

norable Anthony C. Beilenson
mber, United States House
f Representatives
)1 Burbank Boulevard
zana, CA. 91356

ar Mr. Beilenson:

am pleased to respond to your inquiry in
alf of Dr. David Jochen, Assistant Chief,
:ral Dental Laboratory, VA Medical Center
MC), West Los Angeles, California. I
ked Dr. Robert Rhyne, Assistant Chjef
dical Director for Dentistry, to care-
lly review Dr. Jochen's concerns.

:ce Dr. Jochen has raised numerous issues,
Rhyne suggested that a member of his

staff meet with Dr. Jochen, the VAMC Director and the Chief of Staff. They will examine and clarify the issues raised and attempt to come to a satisfactory resolution. Dr. Chester Paczkowski, Director, Dental Program Management Service, coincidentally will be attending a Central Dental Laboratory seminar at the West Los Angeles VAMC July 29-31, 1985. He will extend his visit to meet with Dr. Jochen and Management on August 1-2, 1985.

Thank you for your interest in this matter.

Sincerely,

JOHN W. DITZLER, M.D.
Chief Medical Director

September 11, 1985

Office of Dentistry (163)

Site Visit to VAMC West Los Angeles, CA.
by Dr. Chester P. Paczkowski, Director,
Dental Program Management Service (163)
July 30-31, 1985
Director of Operations (163)

PURPOSE: Special purpose visit to evaluate the administrative and professional activities of the Central Dental Laboratory (CDL) and the concerns expressed by the Assistant Chief, Central Dental Laboratory, in that regard.

FINDINGS: A tour of the laboratory was conducted by Dr. William Pagan, Chief, Central Dental Laboratory. The space assigned to the laboratory is adequate and the design conducive to good functional flow.

The entrance interview with the VAMC Director, Mr. William K. Anderson, and the Chief of Staff, Dr. Earl Gordon, was held

late in the afternoon due to previous commitments. Both expressed concerns regarding the apparent conflict between the Chief and Assistant Chief in the Central Dental Laboratory and conveyed their strong support and desire to resolve the strained interpersonal relationship.

Following the entrance interview, the reviewer resumed the interviewing process with the remaining staff on duty. All of them perceived morale to be poor for the past several years. One reason was the development and implementation of composite laboratory values (CLVs). Time values are applied to each step of the fabrication of a prosthesis and applied to the GS grades for laboratory technicians. The higher the GS grade, the greater the number of CLVs needed to meet minimum requirements. On the positive side, each technician is aware of what is expected of him/her. In addition, the Chief has an

effective method to measure efficiency of the laboratory technician's activities. It appears that the intial apprehension by the technicians regarding the impact of the CLVs on their performance has subsided.

The second reason for the poor morale was the strained relationship between the Assistant Chief, Central Dental Laboratory, Dr. David Jochen, and the technicians. They realized that Dr. Jochen was tremendously disappointed because he was not selected as Chief of the laboratory. It was the unanimous opinion of the staff that their interpersonal relationships with him were bad prior to the selection process for Chief and became worse after he was not selected. Comments they made of Dr. Jochen ranged from lack of empathy and respect for people to hostility and vindictiveness.

The same strained relationship was obvious between Dr. Jochen and Dr. Pagan. In fact, Dr. Pagan felt that Dr. Jochen was under-

mining his efforts to improve the laboratory's efficiency and effectiveness, thus raising questions of loyalty. For example, Dr. Jochen convinced Dr. Pagan (who, realizing Dr. Jochen's disappointment in the Chief selection, decided to give him more input into management decisions) to write a memo of policy to all personnel stating that medical certification was required for all sick leave taken. This obviously had to be rescinded and the Chief apologized to his staff.

Dr. Jochen stated that he respects the position of the Chief but doesn't have to respect the individual, which was the case in this particular situation. In spite of this conviction, he felt the two could work it out. He also stated that whenever he felt that the Chief was wrong regarding VA regulations, he would take the necessary actions, without conferring with the Chief, to expose it for correction. His experience

and assignments under the previous Chief were, in his words, more of a technician rather than of an Assistant Chief. In order to resolve the situation, the reviewer held a joint meeting with both of the dentists and it was apparent that the hostility and lack of respect between them was beyond any realistic compromise or correction.

The automated information system that was developed for CDLs and implemented last year was not in full operation. The aspects being used were incomplete and no systematic process followed. Consequently, the output data was inaccurate and incomplete. Much of the cause can be attributed to the poor environment in the laboratory, the retirement of the secretary that was trained to operate the automated system and the retirement of the previous Chief. To correct the computer system problems, the Office of Dentistry

has detailed the Chief, Central Dental Laboratory, Dr. Charles Dodson, VAMC West Chicago, IL to the West Los Angeles CDL, August 17-22, 1985. After the corrections are made he will train the appropriate staff in the use of the automated system.

CONCLUSION: The relationship of the staff, including the Chief, with Dr. Jochen has reached the point where there cannot be a realistic resolution within the laboratory. If the present situation was allowed to continue, further deterioration could be expected. Since the compatibility between the Chief and the technicians is good, it appears that the best solution is to reassign Dr. Jochen to clinical care activities within the West Los Angeles VAMC. It is further suggested that he be given sufficient time to sharpen his clinical skills. There is anticipation that a new environment for Dr. Jochen will allow him the opportun-

ity to develop the necessary skills needed for effective leadership. His desire to continue to do research should be honored.

The findings and recommendations contained in this report were presented to Mr. Anderson, Dr. Gordon and Dr. Pagan at the exit briefing. Their genuine interest and concern were most gratifying and the courtesies extended during the visit were appreciated.

RECOMMENDATION:

1. That Management take the necessary actions to reassign Dr. Jochen to a direct clinical care position within the facility as soon as possible.

CHESTER P. PACZKOWSKI, D.D.S.

VETERANS ADMINISTRATION

OFFICE OF INSPECTOR GENERAL

REPORT OF INVESTIGATION

Title Date 11/19/85 appvd GRS

File No 517-057

(Redacted Name)

VAMC West Los Angeles
Wadsworth Division
Los Angeles, CA
90073

Report by S/A A.E. Gonzales

Status Pending

Distribution 51LA (Orig.);
51 (2); 53(1)

(Conflict of Interest)

DETAILS

Investigation based on information from Dr. Daniel G. Jochen, Assistant Chief, Central Dental Laboratory who alleged SUBJECT is a member of an outside company named Panadent Corporation. SUBJECT is

listed on curriculum vitae as a professional consultant and faculty consultant for Panadent Corporation and Occlusion Seminars, respectively; both located in Grand Terrace, California.

On August 5, 1985, Dr. Jochen further alleged that as a result of his allegations to the VA/OIG, Los Angeles, regarding SUBJECT, that he (Dr. Jochen) was being transferred from the Central Dental Laboratory (CDL), West Los Angeles VAMC to the Dental Service, Brentwood Division, Los Angeles; i.e. reprisals ere being taken against him.

(Redacted Name) was interviewed concerning the alleged reprisal action against Dr. Jochen. (Redacted Name) advised that Dr. Jochen's reassignment was the result of his disruptive behavior and actions which were not in the best interests of CDL operations and its Chief. It was determined by the (Redacted Name); as evidenced by an August 29, 1985 memorandum to Dr. Jochen from the

Chief of Staff, that his reassignment was in the best interests of both patient care and his own career.

(Redacted Name) VAMC West Los Angeles, stated that reassignment of Jochen was considered six weeks prior to Jochen's visit to the VA Office of Inspector General, Los Angeles, CA and resulted from continuing personnel problems with Jochen incidental to his not being selected as Chief, Central Dental Laboratory in January 1985.

Allegations initially brought forth by Dr. Jochen will be addressed in a subsequent report.

OFFICE OF THE SPECIAL COUNSEL
U.S. Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Suite 1100
Washington, D.C. 20005

April 15, 1986

Dr. David G. Jochen:

We have completed our investigation into the complaint you filed with our office. You alleged that Dr. William Pagan received unlawful preference when selected as Chief, Central Dental Laboratory. You also alleged that you were detailed and later reassigned to a staff dentist position in reprisal for protected whistleblower disclosures.

The evidence we have obtained does not support further action in this matter. With respect to Pagan's selection, the evidence showed he was qualified for the position; he was not given a personal

interview; you and Pagan were the final candidates and you were non-selected. We found no evidence that this action violated any law, rule or regulation.

Regarding your detail and reassignment, we found that concerns about your affect on CDL morale and ability to work with Dr. Pagan arose before you complained to the IG. These concerns formed the basis for the later decision to detail and reassign you. Although these concerns arose after you wrote your Congressman, there was no evidence of a nexus between your letters to Congressman Beilenson and the above personnel actions.

Therefore, having insufficient evidence to establish the commission of prohibited personnel practices, we are closing our file on this matter.

Sincerely,

William E. Reukauf

Associate Special Counsel

for Prosecution

WER:JLM/amb/gdj

STATUTES AND REGULATIONS

Privacy Act of 1974:

5 U.S.C. §552a: Records maintained on individuals

(a) Definitions.

For purposes of this section--

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under control of any agency from which information is retrieved by the name of the individual or by some other identifying number, symbol, or other identifying particular assigned to the individual;

(d) Access to records

Each agency that maintains a system of records shall--

(2) permit the individual to request amendment of a record pertaining to him and--

(A) not later than 10 days (excluding Saturdays, Sundays, and legal holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either--

(i) make any correction of any portion thereof which

the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency, and the name and business of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the

head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(e) Agency requirements

Each agency that maintains a system of records shall--

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by

executive order of the President;

(2) collect information to the greatest extent practical directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless per-

tinent to and within the scope of an authorized law enforcement activity;

(g)(1) Civil remedies

Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails fo make such review in conformity with that subsection;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individ-

ual; or

(D) fails to comply with any other provision of this section, or any rule promulgated therunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasoable attorney fees and other litigation costs

reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

Civil Service Reform Act of 1978:

5 U.S.C. §2301: Merit System Principles

(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relatvie ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and equitable reatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

(7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences--(a) a violation of any law, rule, or regulation, or

(b) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to

public health or safety.

5 U.S.C. § 2302(b)

A prohibited personnel practice includes--

Taking or failing to take a personnel action as a reprisal against a whistleblower;

Taking or failing to take a personnel action as a reprisal for the exercise of any appeal right:

Taking or failing to take any other personnel action if that would violate any law, rule, or regulation implementing or directly concerning the merit system principles.

DM&S Supplement, MP-5, Part II, Chapter 11

11B.07 Reassignment and Change of Duty Assignment

a. Reassignment

(2) Reassignments will be made in accordance with paragraph 11B.03.

In some instances, reassignment may result from a review of the employees work record by the Professional Standards Board...

11B.03 GENERAL

c. Transfers, reassignments, details, and changes in duty assignment will be based primarily on patient care needs. To the extent possible, these movements should be made to make maximum use of employees' skills and capabilities and to provide employees with opportunities for professional growth and development. No employee should be reassigned or transferred unless there is every expectation that the individual will be able to perform satisfactorily in the new assignment.

Administrative Procedure Act of 1976:

5 U.S.C. §706: Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.